

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TERI L. LYNN,

Plaintiff,

vs.

MICHAEL J. ASTRUE,

Defendant.

CASE NO. 08cv0022 BTM (CAB)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Plaintiff and Defendant have filed cross-motions for summary judgment. For the reasons set forth below, the Court **GRANTS in part** and **DENIES in part** Plaintiff's Motion for Summary Judgment and **GRANTS in part** and **DENIES in part** Defendant's Motion for Summary Judgment.

I. BACKGROUND

Plaintiff Teri L. Lynn ("Plaintiff" or "Lynn") was born on July 27, 1969. She alleges that she became disabled on November 2, 2004 due to severe migraines, vertigo, and a heart condition. (Tr. 99.) Prior to her alleged disability period, Plaintiff held jobs as a customer service representative, sales manager, secretary, and store manager. (Tr. 100.)

On August 23, 2005, Plaintiff Teri L. Lynn ("Plaintiff" or "Lynn") filed an application for disability benefits under Title II of the Social Security Act. On December 7, 2005, the Social Security Administration ("SSA") denied Lynn's application. (Tr. 39–43.) On January 22,

1 2006, Lynn filed a request for reconsideration. (Tr. 44.) On May 11, 2006, the SSA again
2 denied Lynn's application. (Tr. 46–50.)

3 On July 9, 2006, Lynn filed a request for a hearing by an administrative law judge. (Tr.
4 51.) Administrative Law Judge Edward D. Steinman (the "ALJ") held a hearing on February
5 6, 2007. (Tr. 284–307.) On March 30, 2007, the ALJ issued a notice of decision denying
6 benefits to Lynn. (Tr. 23–32.) On November 5, 2007, the Appeals Council of the Social
7 Security Administration denied Lynn's request to review the ALJ's determination. (Tr. 4–7.)

8
9 On January 3, 2008, Plaintiff filed a Complaint for Review with this Court.

10 11 **II. THE ALJ'S FINDINGS AND CONCLUSIONS**

12 The ALJ followed the five step process set forth under the Social Security Regulations
13 to determine that Lynn was not disabled. The five steps are as follows: (1) Is the claimant
14 presently working in any substantially gainful activity? If so, then the claimant is not disabled.
15 If not, then the evaluation proceeds to step two. (2) Is the claimant's impairment severe? If
16 not, then the claimant is not disabled. If so, then the evaluation proceeds to step three. (3)
17 Does the impairment "meet or equal" one of a list of specific impairments set forth in
18 Appendix 1 to Subpart P of 20 C.F.R. Part 404? If so, then the claimant is disabled. If not,
19 then the evaluation proceeds to step four. (4) Is the claimant able to do any work that she
20 has done in the past? If so, then the claimant is not disabled. If not, then the evaluation
21 proceeds to step five. (5) Is the claimant able to do any other work? If not, then the claimant
22 is disabled. If, on the other hand, the Commissioner can establish that there are a significant
23 number of jobs in the national economy that the claimant can do, then the claimant is not
24 disabled. 20 C.F.R. § 404.1520. See also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir.
25 1999).

26 The ALJ first determined that Plaintiff had not engaged in substantial gainful activity
27 since her alleged onset date of November 2, 2004. (Tr. 28.) Proceeding to step two, the ALJ
28 found severe impairments including migraines, vertigo, and Meniere's disease. (Tr. 28.) At

1 step three, however, the ALJ held that Lynn's impairments did not "meet or equal" one of the
2 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Tr. 28.) The ALJ relied
3 upon the testimony of the medical expert ("ME") to conclude, at step four, that Lynn had the
4 residual functional capacity to perform work activity without any exertional limitations and
5 occasional postural limitations for balancing and climbing and no climbing ropes, ladders or
6 scaffolds, and avoiding concentrated exposure to noise and vibration, and avoiding all
7 exposure to hazards such as machinery and heights. (Tr. 31.) The ALJ found that the
8 Plaintiff's statements regarding the intensity, persistence, and limiting effects of her
9 symptoms were not entirely credible. (Tr. 31.) Additionally, the ALJ determined that the
10 letter opinions from Lynn's treating physician, Dr. Hoffer, were inconsistent with his
11 examinations of record, and, therefore, entitled to little weight. (Tr. 32.) Finally, the ALJ
12 credited the vocational expert's ("VE") testimony that an individual Plaintiff's age and
13 education level, with similar work experience and residual functional capacity, could perform
14 the duties of Plaintiff's past relevant work activity as a store manager ("Manager, Retail
15 Store" - DOT # 185.167-046), secretary ("Secretary" - DOT # 201.362-030), or general office
16 administrative clerk ("Administrative Clerk" - DOT # 219.362.010). (Tr. 32.)

17 18 **III. STANDARD**

19 The Commissioner's denial of benefits may be set aside if it is based on legal error
20 or is not supported by substantial evidence. Jamerson v. Chater, 112 F.3d 1064, 1066 (9th
21 Cir. 1997). Substantial evidence is more than a scintilla but less than a preponderance. Id.
22 Substantial evidence is "relevant evidence which, considering the record as a whole, a
23 reasonable person might accept as adequate to support a conclusion." Flaten v. Secretary
24 of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995). The Court must weigh the
25 evidence that supports and detracts from the ALJ's conclusion and, where the evidence
26 tends to support either outcome, the Court cannot substitute its own opinion for that of the
27 ALJ. Matney v. Sullivan, 981 F.2d 1016, 1018 (9th Cir. 1992); Martin v. Heckler, 807 F.2d
28 771, 772 (9th Cir. 1986).

IV. DISCUSSION

Plaintiff appeals the ALJ's decision on two grounds. First, Plaintiff argues that the ALJ's decision must be vacated because the ALJ's finding that Plaintiff could perform her past relevant work activities was based on legal error and not supported by substantial evidence. Second, Plaintiff contends that the ALJ's rejection of Plaintiff's treating physician's opinion was based on legal error and not supported by substantial evidence.

A. Plaintiff's Ability to Perform Past Relevant Work Activities

Plaintiff argues that the ALJ's finding that Plaintiff could perform her past relevant work activities was based on legal error because the ALJ failed to ask the VE whether her testimony conflicted with the Dictionary of Occupational Titles ("DOT") and, if so, whether there was a reasonable explanation for the conflict.

Under SSR 00-4p, the ALJ has an affirmative duty to ask about any possible conflict between the VE evidence and information provided in the DOT. The ALJ must (1) ask the VE if the evidence he or she provided conflicts with information provided in the DOT; and (2) if the VE's evidence appears to conflict with the DOT, obtain a reasonable explanation for the apparent conflict. A reasonable explanation for a conflict may be based on information that is not included in the DOT – e.g., information obtained directly from employers or other publications about a particular job's requirements or information based on the VE's own experience in job placement or career counseling. SSR 00-4p.

In Massachi v. Astrue, 486 F.3d 1149 (9th Cir. 2007), the Ninth Circuit held that the ALJ must perform the inquiries under SSR 00-4p before relying on a VE's testimony regarding the requirements of a particular job. If the ALJ fails to do so despite a potential conflict between the VE's testimony and the DOT, the Court cannot determine whether the ALJ's decision that the plaintiff can perform other work was supported by substantial evidence and, therefore, must remand the case. Id. at 1154.

To determine whether Plaintiff could perform her past relevant work activities, the ALJ proposed the following hypothetical to the VE: "[N]o exertional limitations. No ropes, ladders

1 or scaffolds. Occasional climbing and balancing. The rest of the posturals frequent. *Avoid*
2 *concentrated exposure to noise*, vibration, and avoid all exposures to hazards.” (Tr. 305.)
3 The VE responded that with these limitations, Plaintiff could perform all her former work
4 activities of secretary, store manager, and administrative clerk. Plaintiff argues that ALJ
5 should have asked the VE whether the limitation of “avoiding concentrated exposure to
6 noise” conflicted with the environmental conditions of Plaintiff’s three past relevant work
7 activities, as defined by the DOT. The DOT indicates that the work activities of a secretary,
8 store manager, and administrative clerk all involve “moderate noise level.” See U.S.
9 Department of Labor, Selected Characteristics of Occupations Defined in the Revised
10 Dictionary of Occupational Titles, App. D (1993); (Tr. 143.) Thus, Plaintiff contends, the ALJ
11 had an affirmative duty to identify and obtain a reasonable explanation between Plaintiff’s
12 concentrated noise limitation and the VE’s testimony that she could perform work activities
13 with a moderate noise level.

14 The Government responds, however, that because the VE noted in her “Study
15 Worksheet” (Tr. 142–45) that all three jobs involved a moderate level of noise, she was “fully
16 aware” of these environmental conditions, and necessarily determined that the performance
17 of work activities with a moderate level of noise did not conflict with the need to avoid
18 concentrated noise. The Court disagrees.

19 Even if the VE was “fully aware” of the moderate noise level involved with all three
20 positions, her knowledge did not relieve the ALJ of his obligation to identify and obtain an
21 explanation for the apparent conflict. The record does not define “concentrated” noise or
22 make clear how it differs from a moderate noise level. While it is possible that an individual
23 required to avoid concentrated noise as a result of her impairments could perform work
24 activities with a moderate level of noise, SSR 00-4p obligated the ALJ to question the VE
25 about this uncertainty. The ALJ did not ask the VE about the conflict and did not explain how
26 the conflict was resolved in his determination.

27 The Court finds the case of Prochaska v. Barnhart, 454 F.3d 731 (7th Cir. 2006), to
28 be instructive. In Prochaska, the plaintiff argued that the jobs identified by the VE required

specific physical capabilities that were beyond her limitations. Although the ALJ asked the expert about work that could be done by someone who could only “occasionally reach above shoulder level,” the VE testified that the plaintiff could perform the job of cashier, which, according to the DOT, involves “reaching frequently.” The Seventh Circuit vacated the district court’s judgment upholding the Commissioner’s decision and remanded the case to the ALJ, explaining:

It is not clear to us whether the DOT's requirements include reaching above shoulder level, and this is exactly the sort of inconsistency the ALJ should have resolved with the expert's help. We cannot determine, based on the record, whether the expert's testimony regarding . . . reaching was actually inconsistent with the DOT. That determination should have been made by the ALJ in the first instance, and his failure to do so should have been identified and corrected by the Appeals Council. We will defer to an ALJ's decision if it is supported by “substantial evidence,” but here there is an unresolved potential inconsistency in the evidence that should have been resolved.

Id. at 736.

As in Prochaska, here there was a potential inconsistency between the VE’s testimony and the DOT. The Court cannot determine whether “avoiding concentrated noise” actually conflicts with the DOT definition of occupations with a moderate noise level. The ALJ had an affirmative duty to ask whether there was a conflict and, if so, whether there was a reasonable explanation for it. Because the ALJ failed to perform the appropriate inquiries under SSR 00-4p, the Court cannot determine whether substantial evidence supports the ALJ’s finding that Plaintiff can perform her past relevant work. Therefore, the Court **GRANTS** Plaintiff’s Motion for Summary Judgment insofar as it argues that the ALJ’s finding that she could perform her past relevant work activities was based on legal error and not supported by substantial evidence. The Court **DENIES** Defendant’s Motion for Summary Judgment on this issue.

B. Rejection of Treating Physician’s Opinion

Plaintiff’s treating physician, Dr. Michael E. Hoffer, submitted two opinion letters on her behalf. In his first letter, dated September 8, 2006, Dr. Hoffer stated:

Ms. Lynn has been a patient of mine for several years. She has been diagnosed with left-sided Meniere’s disease and Migraines. Ms. Lynn

1 complains of hearing loss and tinnitus at all times. She has intermittent
2 episodes of vertigo lasting several hours that occur 2–6 times a week. These
3 are all associated with worse hearing loss and tinnitus. In addition to these
4 attacks, she has severe headaches which are also associated with vertigo.
5 She will be totally disabled with both these types of attacks for several hours
6 and than [sic] feel incapacitated for several hours afterwards. She has failed
7 all medical therapy. Due to her dizziness, headaches, and hearing loss – she
8 is totally disabled and cannot work. This disability has been present since
9 December 1, 2004. (Tr. 275.)

10 In Dr. Hoffer's second opinion letter, dated February 7, 2007, Dr Hoffer wrote:

11 I have been treating Ms. Teri Lynn since December of 2004. Ms. Lynn has
12 debilitating dizziness, hearing loss, and tinnitus. She initially carried the
13 diagnosis of Migraine Associated Dizziness but after tests revealed the
14 presence of endolymphatic hydrops (extra fluid in the inner ear) she was given
15 the diagnosis of Meniere's disease with migraines. Her condition is totally
16 disabling and makes it impossible for her to maintain consistent employment
17 due to unpredictable and violent episodes of dizziness and debilitating
18 headaches.

19 The ALJ rejected Dr. Hoffer's opinion. The ALJ concluded:

20 As for the opinion evidence, Dr. Hoffer's letter at Exhibit 12F is rejected as
21 totally inconsistent with examinations of record, including his own examination
22 at Exhibit 11F. Dr. Hoffer opined that the claimant's condition was "totally
23 disabling" making it "impossible for her to maintain consistent employment."
24 Dr. Hoffer expresses opinions that concern issues specifically reserved to the
25 Commission, and as such, the undersigned gives little weight to said opinions.
26 (Tr. 32.)

27 As a general matter, treating physicians' opinions are given controlling weight when
28 they are supported by medically acceptable diagnostic techniques and not inconsistent with
other substantial evidence in the record. See 20 C.F.R. § 404.1527(d)(2); SSR 96-2p.
Where another doctor contradicts a treating physician's opinion, the ALJ may not reject the
treating physician's opinion without providing "specific and legitimate reasons" supported by
substantial evidence in the record. Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1990).
In so doing, the ALJ must do more than proffer his own conclusions – he must set forth his
own interpretations and why they are superior to that of the treating physician's. Embrey v.
Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). The ALJ may meet this burden by conducting
a detailed and thorough discussion of the facts and conflicting evidence, and by explaining
his interpretations and findings. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989).

Even if a treating physician's opinion is inconsistent with other substantial evidence
in the record, it is still entitled to deference and must be weighed using the factors provided

1 in 20 C.F.R. § 404.1527. Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001); SSR
2 96-2p. These factors include, inter alia, the “nature and extent of the treatment relationship”
3 between the patient and the treating physician, the “length of the treatment relationship and
4 the frequency of examination,” the amount of relevant evidence that supports the opinion and
5 the quality of the explanation provided, and the consistency of the medical opinion with the
6 record as a whole. 20 C.F.R. § 404.1527(d)(2)-(6). An ALJ may rely on the absence of
7 objective findings to reject a treating physician’s opinion. See Johnson v. Shalala, 60 F.3d
8 1428, 1432 (9th Cir. 1995).

9 Initially, the Court notes that a treating physician may render an opinion on the
10 ultimate issue of disability. Reddick, 157 F.3d at 725. “The administrative law judge is not
11 bound by the uncontroverted opinions of the claimant’s physicians on the ultimate issue of
12 disability, but he cannot reject them without presenting clear and convincing reasons for
13 doing so.” Id. Thus, the ALJ’s rejection of Dr. Hoffer’s opinion simply because it
14 “concern[ed] issues specifically reserved to the Commission,” regarding the ultimate issue
15 of disability, was not legitimate.

16 The Court finds, however, that the ALJ otherwise offered clear and convincing reasons
17 for discounting Dr. Hoffer’s opinion. In his written decision, the ALJ discussed the facts and
18 conflicting evidence. He described the examinations of Plaintiff conducted by Dr. Hoffer as
19 well as other physicians.

20 The ALJ agreed with the ME’s testimony that there was “no organic basis for the
21 claimant’s alleged dizziness.” (Tr. 31.)¹ Although Dr. Hoffer’s February 7, 2007 letter stated
22 that tests revealed the presence of endolymphatic hydrops (extra fluid in the inner ear), no
23 prior medical records made any mention of this condition. In addition, the ALJ noted that
24 Plaintiff “has undergone objective testing for vertigo and vestibular ocular reflex (VOR) and
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26 ¹ Furthermore, the ME testified that hearing loss is associated with Meniere’s disease.
27 and that other than Plaintiff’s subjective complaints, no evidence of hearing loss exists in the
28 record. The ME also testified that Plaintiff should always have nystagmus if she is suffering
from objective vertigo. Although nystagmus was induced on a few occasions by head-shake
or the Hallpike Maneuver, most of the time, the nystagmus test was negative, even when
Plaintiff complained of vertigo. (TR 188, 273.)

1 the results, as well as the results of all objective examinations, have been negative.”

2 Where a physician relies solely on a patient’s subjective complaints and the record
3 shows that the patient lacks credibility, the ALJ may discount the physician’s opinion.
4 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). Additionally, an ALJ may reject
5 the opinion of a treating physician if it is “brief, conclusory, and inadequately supported by
6 clinical findings.” Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002).

7 Dr. Hoffer’s opinion is brief, conclusory, and appears to be based almost entirely on
8 Plaintiff’s subjective complaints. The opinion does not cite any clinical findings as support,
9 perhaps because no such clinical findings exist. Dr. Hoffer’s treatment records reflect
10 Plaintiff’s complaints but do not set forth objective observations or assessments that
11 corroborate Plaintiff’s complaints. Although, at varying times, nystagmus was induced,
12 abnormalities in gait were observed, and Romberg’s sign was present, these results do not
13 provide information regarding the severity of Plaintiff’s impairment and the extent of her
14 limitations and do not validate Dr. Hoffer’s opinion that Plaintiff is totally disabled. The
15 conclusion that Dr. Hoffer’s opinion is primarily based on Plaintiff’s subjective complaints is
16 supported by Dr. Hoffer’s statements that Plaintiff suffers from hearing loss. Dr. Hoffer’s
17 treatment records actually show that upon examination, Plaintiff’s ears were normal. (TR
18 273.) No abnormal hearing test results were recorded.

19 The ALJ found that Plaintiff’s statements concerning the intensity, persistence, and
20 limiting effects of her impairments were not credible. (TR 31.) The ALJ found not credible
21 Plaintiff’s claim that she suffered from her symptoms 100% of the time. Although Plaintiff
22 complained of vertigo, dizziness, and headaches at some of her examinations, the
23 complaints were not consistent. As explained by the ALJ, “[t]he evidence of record contains
24 several references to examinations where the claimant indicated she experienced no
25 migraines.” The record supports the ALJ’s statement, as it appears Plaintiff did not complain
26 of migraines or dizziness in her examinations on October 17, 2005 and December 8, 2005.
27 (See Tr. 239–42; Tr. 235.) The ALJ also explained that Plaintiff lacked credibility because
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1 Plaintiff's testimony contradicted itself.² Plaintiff does not challenge the ALJ's credibility
 2 finding. Thus, the ALJ properly discounted Dr. Hoffer's opinion, which rested upon Plaintiff's
 3 subjective complaints.

4 Plaintiff argues that even if the ALJ did not accord Dr. Hoffer's opinion controlling
 5 weight, he nonetheless failed to consider any of the factors specified in 20 C.F.R. §
 6 404.1527(d)(2)–(6). The Court disagrees. The ALJ specifically found that Dr. Hoffer's
 7 opinion regarding the nature and severity of Plaintiff's impairments was not supported by
 8 clinical techniques and conflicted with other evidence in the record. See C.F.R. §
 9 404.1527(d)(2). The ALJ also considered the "supportability" and "consistency" of Dr.
 10 Hoffer's opinion. See C.F.R. § 404.1527(d)(3)–(4). As already discussed, Dr. Hoffer did not
 11 identify clinical evidence in support of his opinion. Moreover, his opinion was inconsistent
 12 with medical examinations showing that Plaintiff did not have hearing loss. Although the
 13 ALJ's opinion could have been more precise, the ALJ sufficiently considered the pertinent
 14 factors in determining not to accord Dr. Hoffer's opinion controlling weight.

15 The Court concludes that the ALJ's rejection of Plaintiff's treating physician's opinion
 16 was not based on legal error and was supported by substantial evidence.

17 18 **III. CONCLUSION**

19 For the reasons explained the above, the Court **GRANTS IN PART** and **DENIES IN**
 20 **PART** Plaintiff's Motion for Summary Judgment and **GRANTS IN PART** and **DENIES IN**
 21 **PART** Defendant's Motion for Summary Judgment. The Court **REMANDS** this case to the
 22 Commissioner of Social Security for further proceedings consistent with this opinion. The

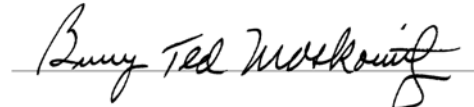
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24 ² In finding the Plaintiff not credible, the ALJ explained:

25 Claimant is not credible as she states she has blackouts and reported her
 26 symptoms to her doctor, as there is no evidence of such in examinations.
 27 Moreover, the claimant testified that she does drive on occasion, and her
 28 physician has not required that her driver's license be revoked, all of which is
 inconsistent with the claimant's allegations of blackout experiences. The
 claimant also stated that she is home schooling her son and claims to spend
 much of her day with him, which is inconsistent with her testimony that she
 spends 70-80% of her day in a dark bedroom. (Tr. 31.)

1 Clerk shall enter judgment accordingly.
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3 **IT IS SO ORDERED.**

4 DATED: December 8, 2009

A handwritten signature in black ink, reading "Barry Ted Moskowitz", written over a horizontal line.

Honorable Barry Ted Moskowitz
United States District Judge

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